

PUBLIC SAFETY DEPARTMENT[661]

Notice of Intended Action

Proposing rule making related to establishment of a statewide sobriety and drug monitoring program and providing an opportunity for public comment

The Department of Public Safety hereby proposes to adopt new Chapter 159, “Statewide Sobriety and Drug Monitoring Program,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 901D.4.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code chapter 901D.

Purpose and Summary

2017 Iowa Acts, Senate File 444, established the statewide sobriety and drug monitoring program for the purpose of protecting the public health and welfare by reducing the number of people on the highways who operate a motor vehicle while under the influence of alcohol or a controlled substance and by reducing the number of repeat offenders who commit crimes in which the use of alcohol or a controlled substance is a contributing factor in the commission of the crime.

The legislation requires the Department to establish a statewide sobriety and drug monitoring program that is available 24 hours per day, seven days per week. The program provides that a court or authorized government entity such as a sheriff’s office or a parole or probation office may require a person who has been charged with, pled guilty to, or been convicted of an eligible offense involving the abuse of drugs or alcohol to be subject to testing to determine whether alcohol or a controlled substance is present in the person’s body.

The program will be available to offenders who are required to participate in the program as ordered by a court or a probation or parole officer as a condition of bond, pretrial release, sentence, probation or parole. Breath testing for alcohol must be done at least twice per day as a condition of the program, and immediate sanctions must be effectively applied if alcohol or controlled substance usage is detected. Testing for controlled substances can be done randomly as often as three times per week. The program also requires that in situations where the Department of Transportation requires a person to install an ignition interlock device as a condition of the person’s license to operate noncommercial motor vehicles, a person must be eligible for a temporary restricted license and must install an ignition interlock device along with participating in the 24/7 program, in jurisdictions where the program is available. Finally, the program will allow testing by an approved alternative method, where twice-a-day testing creates a documented hardship, if such methods and devices have been approved by the commissioner of public safety.

The legislation also requires the Department to promulgate rules to provide for the nature and manner of testing, including the procedures and apparatus used for testing; to establish a fee structure to pay for the costs of the program; to provide for the acceptance of public and private grants and donations to support the program; to establish a stakeholder group to review and recommend changes to the program; and to establish an application process for jurisdictions that want to participate in the program. The legislation further requires the Department to provide a data management system to be used by the Department and all participating jurisdictions for the program.

The purposes of the program are focused on highway safety, and specifically on offenders who commit an eligible offense involving alcohol or controlled substances and driving a motor vehicle. Research shows that persons who have committed an eligible offense and who then participate in a sobriety monitoring program that requires twice-a-day testing make changes and better decisions about their use of alcohol or controlled substances before driving a motor vehicle, which results in a lower recidivism rate. These changes will also result in safer roads and healthier employees and families. The program implemented by these rules is not designed or intended as a substitute for an appropriate alcohol or drug treatment program or as a substitute for parole or probation supervision.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa. The legislation provides that the program fees, including the costs of testing, are paid by the participants.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Pursuant to the provisions of rule 661—10.222(17A), the Department does not have authority to waive requirements established by statute. Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions, if any. Pursuant to the provisions of rule 661—10.222(17A), the Department has the authority to grant waivers from the rules.

Public Comment

Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Department no later than 4:30 p.m. on March 6, 2018. Comments should be directed to:

Barb Edmondson
Department of Public Safety
Oran Pape State Office Building
215 East 7th Street
Des Moines, Iowa 50319
Email: edmondso@dps.state.ia.us
Phone: 515.725.6188

Public Hearing

A public hearing at which persons may present their views orally or in writing will be held as follows:

March 6, 2018	First Floor Public Conference Room 125
10 to 11 a.m.	Oran Pape State Office Building
	215 East 7th Street
	Des Moines, Iowa

Persons who wish to make oral comments at the public hearing may be asked to state their names for the record and to confine their remarks to the subject of this proposed rule making.

Any persons who intend to attend a public hearing and have special requirements, such as those related to hearing or mobility impairments, should contact the Department and advise of specific needs.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its regular monthly meeting or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making action is proposed:

Adopt the following **new** 661—Chapter 159:

CHAPTER 159
STATEWIDE SOBRIETY AND DRUG MONITORING PROGRAM

661—159.1(901D) Program created. The statewide sobriety and drug monitoring program, also referred to as the “24/7 program,” is established in the department of public safety for use by participating jurisdictions. The program shall be available 24 hours per day, seven days per week in the participating jurisdictions. Participation in or use of the 24/7 program is a voluntary decision of a participating jurisdiction. A participating jurisdiction cannot be required to participate in or to continue to participate in the 24/7 program.

661—159.2 to 159.9 Reserved.

661—159.10(901D) Definitions. The following definitions apply to this chapter:

“*Alcohol*” means an alcoholic beverage as defined in Iowa Code section 321J.1.

“*Commissioner*” means the commissioner of public safety as defined in Iowa Code section 80.1A.

“*Controlled substance*” means the same as defined in Iowa Code section 124.101.

“*Department*” means the department of public safety.

“*Eligible offense*” means a criminal offense in which the abuse of alcohol or a controlled substance was a contributing factor in the commission of the offense, as determined by the court or a governmental entity of the participating jurisdiction. For purposes of operating while intoxicated offenses committed in violation of Iowa Code section 321J.2, “eligible offense” includes only the following offenses:

1. A first offense in which the person's alcohol concentration exceeded .15.
2. A first offense in which an accident resulting in personal injury or property damage occurred.
3. A first offense in which the person refused to submit to a chemical test requested pursuant to Iowa Code section 321J.6.

4. A second or subsequent offense.

“*Failed test*” means any of the following:

1. A test or combination of tests that shows the presence of alcohol, a controlled substance, a combination of alcohol and one or more controlled substances, or a combination of two or more controlled substances, if any of the controlled substances are not prescribed by a health care provider or are not used in accordance with the health care provider's written instructions.

2. A failure or refusal to submit to testing, including but not limited to the nonpayment of the required fee.

3. Incomplete testing or results that indicate efforts to tamper with or interfere with the test or with valid test results, whether or not those efforts are successful.

4. Failure to appear to submit to testing.

“*Immediate sanction*” means a sanction that is applied within minutes of a failed test result.

“*Law enforcement agency*” means a sheriff's office, city police department or parole or probation office of the Iowa department of corrections that has been approved to administer, implement and enforce

the statewide sobriety and drug monitoring program established in Iowa Code chapter 901D for the participating jurisdiction.

“Participating jurisdiction” means a county or a city that chooses to participate in the statewide sobriety and drug monitoring program and that has been approved for participation by the department.

“Sobriety and drug monitoring program” or *“24/7 program”* means the statewide sobriety and drug monitoring program established in Iowa Code chapter 901D.

“Test” or *“testing”* means a procedure or set of procedures performed using equipment, devices and methods approved by the commissioner to determine the presence of alcohol or a controlled substance in a person’s breath or bodily fluid, including blood, urine, saliva, and perspiration, and includes any combination of breath testing, drug patch testing, urine analysis testing, saliva testing, and continuous or transdermal alcohol monitoring.

“Timely sanction” means a sanction that is applied within hours or days after a failed test result. A timely sanction shall be applied as soon as possible, but the period between the failed test result and the application of the timely sanction shall not exceed five days.

661—159.11(901D) Participating jurisdiction requirements.

159.11(1) Program requirements. As a participating jurisdiction of the 24/7 program, the participating jurisdiction shall:

- a. Designate the law enforcement agency or third-party provider that will administer, implement and enforce the 24/7 program. More than one law enforcement agency or third-party provider may be designated.
- b. Provide one or more locations for testing persons who are participating in the 24/7 program for the presence of alcohol or a controlled substance.
- c. Ensure that each designated location is available 24 hours per day, seven days per week for persons to be tested.
- d. Ensure that personnel who administer tests and collect bodily specimens for testing at the location have all required training and certifications to use or operate the testing equipment or devices.
- e. Provide testing equipment and devices.
- f. Collect program fees from persons subject to testing and use program fees to pay for the participating jurisdiction’s costs to administer the program and purchase or maintain testing equipment and devices.
- g. Provide for and apply immediate sanctions for failed tests.
- h. Provide for and apply timely sanctions for failed tests.
- i. Provide test results to the court, prosecutor, and person’s attorney and also provide test results and other required program information to the program data management system.
- j. Provide for one or more alternative testing methods, if such methods have been approved by the commissioner, in cases of persons for whom testing at least twice per day creates a documented hardship or is geographically impractical.
- k. Establish and maintain a 24/7 program account, place all program fees collected into the account and use the funds in the account only for the purposes of administering and operating the 24/7 program, including but not limited to paying for the services of a third-party provider. The funds in the account shall be considered public funds and shall be subject to the rules and policies of the state auditor’s office.
- l. Establish a program to accept public or private grant funds, gifts, or donations and use the funds received to support program activities, including but not limited to the payment of fees for indigent persons. The funds collected under this program may be deposited and held in the 24/7 program account.
- m. Provide reports to the department as required.
- n. Ensure that an audit of the 24/7 program account is conducted at least annually and make the audit available to the department upon request.
- o. Maintain sufficient security protocols to protect the personal information of persons subject to testing from unauthorized use.
- p. Be approved by the department as a participating jurisdiction.

159.11(2) *Third-party provider.* A participating jurisdiction may designate a third-party provider to provide testing services and any other action or requirement of the participating jurisdiction, including but not limited to the requirements in subrule 159.11(1). The department shall review any third-party provider designated by the participating jurisdiction as a part of the application process. A third-party provider must be approved by the department before providing any service of the 24/7 program.

159.11(3) *Application.* A county or city that desires to become a participating jurisdiction shall submit an application to the department. The application shall be made on a form provided by the department, which is available at www.dps.state.ia.us/commis/gtsb/index.shtml. The department shall notify the participating jurisdiction whether it has been approved to participate in the 24/7 program. Approval shall be in the sole discretion of the department.

661—159.12(901D) Participant requirements.

159.12(1) *Requirements.* A person subject to testing in the 24/7 program is required to do all of the following:

a. Abstain from all alcohol and controlled substances while enrolled in the program. If a person has been issued a prescription for a controlled substance, the person may participate in the 24/7 program and continue to take the prescribed controlled substance only with the health care provider's approval and in accordance with the health care provider's written instructions.

b. Submit to testing as required to determine whether alcohol or a controlled substance is present in the person's body.

c. Participate in the 24/7 program when ordered as a condition of bond, pretrial release, sentence, probation, parole, or a temporary restricted license.

d. Sign all forms, waivers and releases and provide all required information that is necessary for participation in the program to enable the testing to occur and the test results to be reported, disseminated and used as required by the 24/7 program, including but not limited to providing testing information to the county attorney, person's attorney, court or parole or probation officer as appropriate.

e. Obtain a temporary restricted license when eligible, if the person's driver's license is suspended or revoked.

f. Install an approved ignition interlock device on all motor vehicles owned or operated by the person if the person's driver's license is suspended or revoked or as is otherwise required by Iowa Code section 321J.17.

g. Pay all program fees, including but not limited to the enrollment fee; the costs of tests, test equipment or test devices; and the costs of installing, activating, monitoring, and deactivating any testing equipment or devices.

h. Agree to be subject to immediate sanctions or timely sanctions, as applicable, for noncompliance with the 24/7 program requirements.

159.12(2) Reserved.

661—159.13 to 159.19 Reserved.

661—159.20(901D) Testing.

159.20(1) *Methods.* The following methods and procedures shall be used to collect samples or perform testing to determine the presence of alcohol or a controlled substance in the person's breath or bodily fluid.

a. Evidentiary breath testing devices and methods as described in rule 661—157.2(321J).

b. Preliminary breath screening test devices and methods as described in rule 661—157.5(321J).

c. Urine collection methods and equipment as described in rule 661—157.3(321J).

d. Saliva testing methods and equipment, as approved by the commissioner and posted on the website of the department.

e. Perspiration testing methods and equipment, as approved by the commissioner and posted on the website of the department.

f. Continuous or transdermal alcohol monitoring, as approved by the commissioner and posted on the website of the department.

g. Any other methods, equipment or devices approved by the commissioner and posted on the website of the department.

159.20(2) Other devices and methods. Scientifically established tests or methods appropriate to a particular device shall be used in determining whether an alternative device or method meets an acceptable standard for operation, including accuracy. The department may, in its discretion, accept test results from another laboratory. The commissioner may consider all other factors in addition to scientific testing and accuracy, including but not limited to cost, availability, and training in determining whether or not to approve a method or device. Approval of other devices or methods is in the sole discretion of the commissioner.

661—159.21 to 159.29 Reserved.

661—159.30(901D) Program fees.

159.30(1) Enrollment fee. A person subject to testing shall pay an enrollment fee of \$30 for each enrollment in the program. A person may be ordered or required to enroll in the program more than once, and the enrollment fee is required for each enrollment.

159.30(2) Fees for tests. A person subject to testing shall pay all fees associated with the testing. The fee for each test shall be maintained on a list approved by the commissioner and posted on the website of the department. The law enforcement agency shall inform a person subject to testing of each applicable test fee.

159.30(3) Payment of fees. A person subject to testing shall pay the fee for each test before taking the test. The law enforcement agency shall not be required to administer the test if the person subject to testing does not pay the fee for the test. Failure to pay the required test fee may subject the person to immediate sanctions or timely sanctions. Community service or other in-kind payment is not authorized as a substitute for payment of the required fees.

661—159.31 to 159.39 Reserved.

661—159.40(901D) Fees—indigent participants. A person subject to testing is required to pay the full fee for each test. The fees are established at the minimum level needed to purchase supplies and equipment and to cover the costs of administering the program.

159.40(1) Determination of indigency. A person subject to testing who requests a determination of indigency for purposes of the 24/7 program shall provide all requested financial information to the law enforcement agency or designated third-party provider so the agency or provider can determine whether or not the person is indigent for purposes of the 24/7 program. A finding of indigency by the court for purposes of determining whether a person should receive court-appointed counsel is not binding on the agency or provider and does not constitute a final determination of indigency for purposes of the 24/7 program. In determining indigency, the agency or provider may consider all relevant financial information, including but not limited to income, assets, other sources of support, barter or in-kind payments, and expenditures including but not limited to expenditures for nonessential or luxury items.

159.40(2) Payment of indigent fees.

a. If the law enforcement agency or designated third-party provider determines that a person subject to testing is indigent and is able to pay a portion of the required fee for testing but is not able to pay the full fee amount, the agency or provider shall require the person to pay only the portion which the person is able to pay. The agency or provider shall authorize payment of the remaining fee out of the 24/7 program funds, including but not limited to funds received from public or private grants, gifts or donations, if such funds have been received.

b. If the law enforcement agency or designated third-party provider determines that a person subject to testing is indigent and is not able to pay any part of the required fee for testing, the agency or

provider shall authorize the payment of the fee out of the 24/7 program funds, including but not limited to funds received from public or private grants, gifts or donations, if such funds have been received.

c. The law enforcement agency or third-party provider shall make a written determination of whether a person subject to testing is indigent and the amount of the fee the person is able to pay, if any. A copy of the written determination shall be provided to the person requesting a determination of indigency.

d. The participating jurisdiction, including the designated law enforcement agency or third-party provider, is not required to provide unpaid or free testing at the jurisdiction's, agency's or provider's expense if there are not sufficient funds in the 24/7 program account. The participating jurisdiction shall first use the funds in the 24/7 program account to pay for the participating jurisdiction's costs to administer the program and purchase or maintain testing equipment and devices and then use any remaining funds to pay fees for indigent participants.

661—159.41 to 159.49 Reserved.

661—159.50(901D) Stakeholder group. The department hereby establishes a stakeholder group for the 24/7 program. The designated stakeholder group for the 24/7 program shall be the Iowa impaired driving coalition. Representatives of other public or private groups may request to be added to the 24/7 program stakeholder group.

159.50(1) Duties. The 24/7 program stakeholder group shall act as an advisory group to the department and the governor's traffic safety bureau. The stakeholder group shall review the 24/7 program and recommend changes to the governor's traffic safety bureau.

159.50(2) Meetings. The 24/7 program stakeholder group shall meet as requested by the bureau chief of the governor's traffic safety bureau. Notice of the stakeholder meetings shall be provided as required by Iowa Code chapter 21. Records of the stakeholder group shall be subject to the provisions of Iowa Code chapter 22.

661—159.51 to 159.59 Reserved.

661—159.60(901D) Grant program established. The department authorizes each participating jurisdiction to create a grant program account for the purpose of accepting public and private grant funds, gifts and donations to support the 24/7 program of the participating jurisdiction. The funds in the account shall be considered public funds and shall be subject to the rules and policies of the state auditor's office.

These rules are intended to implement Iowa Code chapter 901D.